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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ESTEVAN HARO ESPINOSA, Defendant and Appellant.	B246238 (Los Angeles County Super. Ct. No. TA122476)

APPEAL from a judgment of the Superior Court of Los Angeles County, Pat Connolly, Judge. Modified and, as so modified, affirmed.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II, William H. Shin and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Estevan Espinosa appeals from the judgment entered following a jury trial that resulted in his conviction for first degree murder. The trial court sentenced him to a term of 26 years to life in prison. Espinosa contends the trial court erred by improperly excluding evidence, misinstructing the jury, and restricting voir dire of prospective jurors; the cumulative effect of the errors requires reversal; his conviction must be reduced to second degree murder because there was insufficient evidence to prove premeditation and deliberation; and his first degree murder sentence of 26 years to life amounts to cruel and unusual punishment. We agree there is insufficient evidence of premeditation and deliberation. Accordingly, we reduce the conviction to second degree murder and modify the sentence to an indeterminate term of 16 years to life. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

a. *Background information*

The victim, Delmirio Lopez, was the boyfriend of Espinosa's mother, Ebelia Haro. Lopez and Haro had been in a relationship for seven or eight years, and had lived together during that period. Lopez was the "breadwinner" for the family, paying for rent, food, and clothing. Espinosa also worked at times at various jobs. In March 2012 Lopez, Haro, Espinosa, Espinosa's younger brother, 18-year-old Asahel, and his younger sister, 16-year-old D., had recently moved to an apartment in Lynwood. The apartment was small, and the kitchen was connected to the living room. D. and Asahel slept in one bedroom; Lopez and Haro slept in another; and Espinosa slept on the living room couch. Espinosa's older sister, Yahaira Espinosa,[1] lived in a separate residence. Lopez had been friends with Roberto Carlos Ramirez Cortez for approximately five years.

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[1] For the sake of convenience, we sometimes hereinafter refer to Espinosa's siblings by their first names.

b. *People's evidence*

On March 17, 2012, Lopez, Haro, Cortez, and Espinosa went out to dinner at approximately 10:00 p.m. or 11:00 p.m. Lopez, Haro, and Cortez had been drinking beer for several hours, and had more at the restaurant; Espinosa had only half a glass. After dinner, the group went back to the Lynwood apartment, where Haro, Lopez, and Cortez drank more beer.

Cortez testified[2] that at approximately midnight, he and Lopez went into the bedroom Lopez and Haro shared to find some music CDs. Espinosa joined them. Lopez angrily asked why Espinosa was not working. Cortez did not hear Espinosa say anything in response. Cortez went back out to the living room, where he and Haro sat on the couch and continued drinking beer. Five minutes later Lopez exited the bedroom and began cutting lemons in the kitchen. Five minutes after that, Lopez, who had finished cutting the lemons, walked toward Cortez to give him a lemon slice. Espinosa emerged from the bedroom and approached Lopez. Espinosa was "carrying something in his right hand," but Cortez could not see what it was because Espinosa had put on a sweatshirt. Espinosa "pulled out his hand," in which he was holding an ice pick. Cortez pulled Lopez away from Espinosa, but Espinosa pulled Lopez toward him. Espinosa stabbed Lopez multiple times. Lopez fell to the ground. Cortez asked what Espinosa was doing. Espinosa did not respond. The attack was over in a minute. Cortez did not see any other weapon in Espinosa's hands.

Cortez did not see Lopez attempt to take pictures with a cellular telephone or open the children's bedroom door. He did not see Lopez punch or hit Espinosa at any time that evening, and he did not see a weapon in Lopez's hands when Espinosa attacked. Espinosa left the apartment within a minute after stabbing Lopez.

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[2] Cortez was unavailable to testify at trial. Accordingly, his preliminary hearing testimony was read to the jury.

Sheriff's Deputies and firefighters were summoned to the apartment at approximately 12:45 a.m. Lopez was treated, transported to a hospital, and died of his injuries at approximately 5:30 a.m.

Meanwhile, Espinosa rode a stolen bicycle to his cousin Victor Cervantes's nearby house. It appeared to Cervantes that Espinosa was intoxicated: his eyes were bloodshot, he smelled of alcohol, and his speech was slurred and loud. Espinosa told Cervantes he had been drinking and had had an "altercation of sorts" with his stepfather, and his mother and stepfather had "kicked him out of the house." Lopez had "put[ ] him down" and pushed him, and "that's when it escalated" and they fought. Espinosa did not tell Cervantes that he had stabbed Lopez. At Espinosa's request, Cervantes drove Espinosa to the neighborhood where Espinosa used to live, which was near Yahaira's residence.

Espinosa turned himself in at the Compton Sheriff's Station at approximately 6:00 a.m. He was transported back to the Lynwood apartment, where Detectives Phillip Martinez and Kevin Acevedo conducted a videotaped interview with him. Espinosa told the detectives that just before the stabbing, while he was in the hallway, he saw Lopez open D.'s bedroom door and attempt to take a photograph of her with a cellular telephone. Espinosa told Lopez not to take the photo, but Lopez smirked and stated it was for his phone's "caller ID." Lopez walked toward his own bedroom, and Espinosa followed. Espinosa thought the picture was "some sexual type of thing" which "got [him] mad." Espinosa again told Lopez not to take pictures of his sister. Lopez pushed Espinosa and told him not to mess with him. Haro moved between her son and Lopez and tried to separate them. Lopez said something like, "you don't want to mess with me because I'll beat you up" and "you don't want no problems more than you already have." They moved toward the living room area and Lopez pushed Espinosa again, saying, "I'll knock you out type of thing." Espinosa thought Lopez was going to hit him or "rush [him]," and panicked. He saw the knife and the ice pick in the kitchen, grabbed them, and stabbed Lopez several times. After seeing Lopez on the floor, Espinosa "just left," taking the knife and ice pick with him. He threw them in a field. He rode a bicycle to Cervantes's house, and left the sweatpants and shirt he had been wearing in a former

neighbor's yard. Prior to the stabbing, Espinosa had had problems with Lopez once or twice, but had never been involved in a physical altercation with him. Espinosa walked the detectives through a step-by-step reenactment of events in the apartment and showed them where he believed he had disposed of the weapons and his clothing.[3] He turned himself in because he wanted to "man up" for what he did and tell his side of the story. He regretted the stabbing.

Lopez's cellular telephone contained two pictures of D., one depicting her partially behind a refrigerator door, and another depicting her standing with a Coke can in front of her face. Both had been taken on the date of the murder, at approximately 4:00 p.m.

An autopsy showed Lopez had suffered 17 stab wounds to his torso, neck, hand, and head, ranging from five inches to less than an inch in depth These included five fatal wounds: two to his back that perforated his aorta; one to his left chest that perforated his heart; and two to his head that penetrated his brain. The wounds were made by two different stabbing instruments: a knife, and an object similar to an ice pick. The fatal wounds to Lopez's head were made with "pretty strong force." Lopez suffered only a single defensive wound to his hand, indicating he was surprised by the attack, did not believe he would be attacked, or was intoxicated. Lopez's alcohol content in his vitreous humor was 0.13, indicating he was "slightly intoxicated."

Lopez had told Cortez that he had been in the military in El Salvador. Cortez had never known Lopez to be violent.

c. *Defense evidence*

As relevant to the issues presented on appeal, the defense presented the following evidence. Within a year after Lopez moved in, which was approximately six years before the murder, Yahaira asked Espinosa to keep an eye on D. because she believed Lopez had been molesting D. Yahaira told D. to stay away from Lopez, and go to a friend's house

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3 The weapons were not recovered. The clothing was.

or stay with Yahaira. When Yahaira told Haro of her impressions, her mother "didn't pay no mind, . . . she just left it alone." Yahaira had not called police about her suspicions, nor did she mention them to detectives following the murder. Lopez had purchased cellular telephones for Haro and D. Lopez frequently consumed alcohol.

D. testified that on the night of the murder, she went to bed in her room at approximately 11:00 p.m., wearing a black tank top and sweatpants. Asahel also went to sleep in the bedroom they shared, while her mother and the other adults drank beer in the living room. Earlier that day Lopez had tried to take a picture of her for his telephone's caller ID, but she had refused. She was awakened when Lopez opened her bedroom door and tried to take a picture of her. Espinosa followed Lopez and asked why Lopez was trying to take D.'s picture while she was sleeping. Lopez replied that Espinosa could not tell him what to do. Espinosa asked D. if she wanted her picture taken and she said no. Lopez pushed Espinosa. Espinosa became angry. D. called her mother, and asked her to "take [Lopez] away," which Haro did. D. then closed and attempted to lock the bedroom door, but the lock was not working. She was scared Lopez was trying to get back in her room; however, he did not return. D. woke again when she heard a thud and sounds from the kitchen approximately 10 minutes later. She went to the kitchen and saw Lopez on the floor where the living room and kitchen intersected, with Espinosa standing in front of him. She told Asahel to call 911.

D. was unaware Lopez had taken a picture of her behind the refrigerator door earlier that day. She told detectives that Lopez "gave [her] a bad feeling." It was not unusual for Lopez to enter her bedroom in the middle of the night. Lopez drank a lot. During the eight years Lopez had lived with the family, she never saw him fight with Espinosa.

Asahel testified that when he arrived home on the night of the murder, D. was dozing off in the bedroom they shared. He went to sleep, but later heard a "ruckus" or "thud" outside his closed bedroom door, and found D. trying to wake him up. He went to the living room and saw Lopez on the ground, his mother on top of him, Espinosa standing in the kitchen, and Cortez in the living room. Asahel told Espinosa to leave and

called for an ambulance. Asahel did not hear any argument about Lopez taking D.'s picture. During the seven years Lopez had lived with the family, Asahel had seen Lopez and Espinosa verbally argue once, but never physically fight.

Espinosa testified in his own behalf. He was a high school graduate, had held several jobs both during and after high school, and was in the process of obtaining a security guard license at the time of the murder. Lopez had told Espinosa he had been in the military, had killed his sergeant, and had served time in jail. Espinosa had seen a photo of Lopez in his military uniform holding an assault rifle. He knew Lopez always carried a folding knife with a four- to five-inch blade on his person. Lopez outweighed Espinosa by approximately 50 pounds. Lopez was a "kind of aggressive," "machismo" person. Lopez and Haro drank "a lot" almost every weekend. Espinosa believed Lopez was sexually attracted to D. based on how he stared at her and interacted with her, and was "inappropriate" with D. "[i]n a sexual way." He had never confronted Lopez about the inappropriate behavior.

On the night of the stabbing, Espinosa and Lopez did not argue at dinner; everyone was having a good time. When Espinosa saw Lopez in D.'s doorway taking a picture with his cellular phone, he did not believe Lopez's explanation that he was taking a photo for his caller ID. Espinosa thought Lopez wanted to go inside the bedroom for a sexual purpose. He thought Lopez would "[p]robably go inside her room and touch her, molest her right there." Espinosa thought he was the only one who could stop Lopez. When Espinosa told Lopez not to take the picture, Lopez became aggressive. D. woke up, and Espinosa asked if she wanted Lopez taking her picture. She seemed scared and replied, " 'No, like, tell him to get out.' " Lopez "kind of grinned" at Espinosa as if to say, " 'you don't tell me what to do.' " Lopez began to walk away toward his bedroom. Espinosa did not believe "that he was going to just walk away and that was it. I believed he was going to come back . . . ." Lopez pushed Espinosa, and pushed him again in the hallway as they argued with raised voices. Haro intervened and tried to separate the two. Lopez "kind of started getting aggressive towards her too," "kind of" pushing her. When they reached the kitchen, Lopez pushed Espinosa again. Lopez reached for what

Espinosa believed was the pocketknife Lopez always carried. He moved his arm as if he was "going to swing at" Espinosa or "get something." Espinosa was afraid and did not know whether Lopez was going to punch him or pull out his pocketknife. Espinosa "was scared. I was fearful for myself. I thought he was going to do something to me." Espinosa saw a knife and an ice pick in the kitchen, within arm's reach, and grabbed both. He approached Lopez and began swinging his arms. That was the last thing Espinosa remembered until he found himself staring at Lopez on the floor. He was shocked.

Asahel told Espinosa to leave. Espinosa found someone else's bicycle downstairs. He returned to the apartment briefly, because he did not know where to go or what to do. Cortez told him " 'get out of here.' " Espinosa then rode to Cervantes's house, tossing the knife and ice pick over a fence into a vacant lot on the way. Cervantes drove him to the home of a friend, who was not home; Espinosa left some of his clothing in the yard. After waiting for the friend for a while, Espinosa continued to Yahaira's house. Espinosa decided to turn himself in after hearing his mother was going to take the blame for the stabbing.

Espinosa testified that his mother customarily kept an ice pick at various locations in the home, and "That day I think she had it right there next to her bed." He testified that it was already in the kitchen when he grabbed it and used it against Lopez; either he or Haro had moved it there earlier.

d. *People's rebuttal*

Deputy Jason Ford responded to the scene of the stabbing at approximately 12:45 a.m. When he arrived Haro was holding Lopez, who was bleeding. D. told Ford that she and Asahel had been sleeping in their room when she heard Asahel jump up and run from the room. She followed him, and discovered her mother holding Lopez, crying. D. did not tell the deputy that Lopez had attempted to take her picture, that she had heard a fight, or that she had seen Lopez inside her room.

Deputy Acevedo examined Lopez's personal belongings collected at the hospital. There was no pocketknife among his things, nor was a pocket or folding knife found at the apartment. When D. was interviewed on the afternoon of March 18, she stated that Espinosa had told Lopez she did not want her picture taken; Lopez said something like "It's not up to you"; they both "got mad"; and Lopez pushed Espinosa. Haro took Lopez away. She was scared and angry, and had a feeling something was going to happen.

2. *Procedure*

On November 27, 2012, the jury found Espinosa guilty of first degree murder (Pen. Code, § 187, subd. (a)),[4] with the personal use of a deadly and dangerous weapon, a knife. (§ 12022, subd. (b)(1).)

Espinosa filed a motion for a new trial on various grounds. The trial court heard and denied the motion on January 15, 2013, concluding there had been no legal error. Before it sentenced Espinosa, the court stated that although it had presided over at least a dozen murder cases as a judge, and tried close to 50 as a prosecutor, "this has been a very difficult case for this court." The court did not believe Lopez had engaged in any sexual conduct toward D., and did not think Espinosa believed that Lopez had done so. The court was at a loss to explain why Espinosa committed the murder, observing, "everyone in there had been drinking. And the court feels that there is more to this story" than was revealed at trial. After noting "This is, without a doubt, the most difficult sentencing that I've had to do," the court sentenced Espinosa to the statutorily mandated term of 25 years to life in prison (§ 190, subd. (a)), plus one year for the arming enhancement, for a total of 26 years to life. It imposed a restitution fine, a suspended parole restitution fine, a court operations assessment, and a court construction fee.

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[4] All further undesignated statutory references are to the Penal Code.

After Espinosa filed his notice of appeal, and over the People's objection, the court reduced the crime to second degree murder. Although the crime could not appropriately be reduced to voluntary manslaughter, the court did "not believe that the defendant is guilty of a first degree murder but of a second degree murder" based on the evidence presented. The only basis for the first degree murder verdict was that "there was testimony that was given that Mr. Espinosa, just moments—and when I say 'moments,' it seems seconds prior to the murder—left the area where this argument occurred, and seems like that was in the hall, goes into his mother's bedroom, takes an icepick, retrieves that, then goes into the kitchen where Mr. Lopez was cutting up limes. [¶] He not only uses that icepick for a stabbing instrument, but also it appears the knife that Mr. Lopez was actually cutting limes with for the next set of Corona beers." While recognizing that "premeditation is obviously not measured in time, and it is measured in the extent of the reflection," the court opined, "I do think that deliberation and premeditation [are] lacking . . . ." The court further reasoned that a 25-years-to-life sentence amounted to cruel and unusual punishment. It explained: "[I]n accord with *Dillon*,[5] I believe that it would be cruel and unusual punishment—and I know that's a term that perhaps may not be the most appropriate in this case because, regardless of what I am doing, Mr. Espinosa, this was truly a heinous crime—I do think this was a crime of rage, and I think that the—what I have cited as far as the premeditation is the only thing that I can look back on with the evidence in this case, and that is the retrieval of that icepick that would allow for a first. [¶] And, again, I don't think that the extent of reflection in this matter is appropriate. And [punishing] it . . . as a first would be grossly disproportionate to what the offense was . . . ."

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5 *People v. Dillon* (1983) 34 Cal.3d 441, abrogated on other grounds by *People v. Chun* (2009) 45 Cal.4th 1172, 1185.

Taking into consideration the nature of the offender, the court observed that Espinosa had been 21 years old when he committed the murder.[6] He had no record except for a misdemeanor conviction for driving with a suspended or revoked license (Veh. Code, § 14601). There was no indication he was a gang member. He turned himself in to police. He appeared to have been truthful and honest in his testimony despite opportunities where he could have twisted the truth in response to counsel's questions. He was remorseful. In the court's view, Espinosa did not pose a future danger to society.

To sum up, the court stated: "[A]s a judge, I believe that I have to do what is the right thing. And this is not something that I have taken lightly. I do not stay up at night. I have a lot of cases, and this is not a situation where I go home and I can't sleep because of what I'm hearing in the courtroom. I live my life and do my thing because it usually does not bother me. [¶] This case has bothered me. . . . Once I made the decision in this case to do what I think is the right thing, I have had no problems sleeping." Accordingly, the court reduced the offense to second degree murder, and resentenced Espinosa to a term of 16 years to life.

Both the People and Espinosa appealed. In a published opinion on the People's appeal, we concluded that the trial court lacked jurisdiction to modify the judgment because Espinosa had already filed his notice of appeal, thereby divesting the trial court of jurisdiction. (*People v. Espinosa* (2014) 229 Cal.App.4th 1487.) We vacated the trial court's order and reinstated the original sentence. We invited further briefing from Espinosa on additional issues relevant in light of our decision. We have received and considered the parties' supplemental briefs.

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6 The trial court's statement of Espinosa's age appears to be incorrect. Espinosa testified that he was 23 years old at the time of trial. Because he committed the murder approximately eight months before trial, he was either 22 or 23 at the time of the killing.

DISCUSSION

1. *Restriction of voir dire*

Espinosa contends the trial court improperly limited his voir dire of prospective jurors, thereby violating his rights to due process, a fair trial, and an unbiased jury. He is incorrect.

a. *Additional facts*

Jury selection took place over the course of three days. The trial court allowed defense counsel and the prosecutor to conduct voir dire of prospective jurors. The trial court sustained objections to some of defense counsel's questions or statements, including: "Do you understand that there is such a thing as a justifiable homicide?"; "Would you be able to listen to the evidence . . . and make a determination as to whether, for example, Mr. Espinosa was defending himself?"; "a murder requires an intent to kill, and it has to be an unlawful intent to kill"; "if you were selected as a juror on this case and the law says otherwise, are you going to say I don't care what the law says, you need to be in control of your emotions at all times, and the fact that you were under the stress of something very emotional doesn't matter?" and "how will you know if this was done in self defense or not." The court also disallowed questions regarding whether jurors could consider all the evidence after hearing the defendant had no defensive wounds, or the victim was intoxicated and had suffered 17 stab wounds; and whether jurors would want "an aggressive lawyer" if a loved one was on trial. The court twice sustained objections to defense counsel's statement that the prosecutor had to prove the crime was not committed in self-defense, but allowed counsel to ask one prospective juror whether he or she understood the defense did not have to prove self-defense. When defense counsel began to "explain" voluntary manslaughter, the court interjected: "We're not going to argue what a voluntary manslaughter or what a murder is." It informed the jury that the attorneys would argue their cases during trial, that the court would instruct on the law, and that the jury would be the judges of the facts based on the evidence. When defense counsel next asked whether a prospective juror could "follow the law on voluntary manslaughter," the court interposed that the appropriate question was, "will

you follow the law as [the court] give[s] it to you?" At another point, when counsel was discussing heat of passion manslaughter, the trial court interposed, "We're going to stop now. We're not going to be trying the case, first of all, and we're not going to incorrectly cite the law."

b. *Discussion*

After the trial court's initial examination of jurors, "counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors." (Code Civ. Proc., § 223.) The court has discretion to limit the oral and direct questioning of prospective jurors by counsel. (*Ibid.*) It " 'has a duty to restrict voir dire within reasonable bounds to expedite the trial' " (*People v. Virgil* (2011) 51 Cal.4th 1210, 1246), and has considerable discretion in the manner in which voir dire is conducted, including limiting the time for direct questioning of prospective jurors by counsel, and determining that a question is not in aid of the exercise of challenges for cause. (*People v. Debose* (2014) 59 Cal.4th 177, 194; *People v. Williams* (2006) 40 Cal.4th 287, 307.) The purpose of voir dire is to aid in the exercise of challenges for cause. (Code Civ. Proc., § 223; *Debose,* at p. 194.) We review a trial court's limitation on voir dire for abuse of discretion. (*Virgil, supra*, at p. 1246; *People v. Benavides* (2005) 35 Cal.4th 69, 88; *People v. Fuiava* (2012) 53 Cal.4th 622, 654 [unless voir dire is so inadequate as to result in a fundamentally unfair trial, the manner in which voir dire was conducted is not a basis for reversal]; *People v. Rogers* (2009) 46 Cal.4th 1136, 1149-1150.)

No abuse of discretion or fundamental unfairness exists here. The trial court properly precluded defense counsel's questions when they strayed into impermissible attempts to instruct the jury on the law or the facts. " 'It is, of course, well settled that the examination of prospective jurors should not be used " 'to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law.' " ' [Citations.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 492-493; *People v. Carter* (2005) 36 Cal.4th 1114, 1178.) The trial court allowed defense counsel ample opportunity to ask a variety of properly

limited and phrased questions regarding jurors' abilities to follow the law on the use of deadly force and self-defense despite their own beliefs and opinions. The trial court " ' "is in the best position to assess the amount of voir dire required to ferret out latent prejudice, and to judge the responses" ' " (*People v. Rogers, supra,* 46 Cal.4th at p. 1149), and we discern no error in its judgment here.

To the extent Espinosa relies on *People v. Williams* (1981) 29 Cal.3d 392, 407 for the proposition that more extensive voir dire was allowable to assist in the " 'intelligent exercise of peremptory challenges,' " *Williams* is no longer good law on this point. "Before the passage of Proposition 115 in the June 5, 1990, Primary Election, the permissible scope of voir dire included examination directed towards the exercise of peremptory challenges. Proposition 115 changed the scope of legitimate inquiry on voir dire by requiring that the examination of prospective jurors be conducted only in aid of the exercise of challenges for cause." (*People v. Mendoza* (2000) 24 Cal.4th 130, 168, fn. 5; *People v. Fuiava, supra,* 53 Cal.4th at p. 654; *People v. Leung* (1992) 5 Cal.App.4th 482, 492-494.)

2. *Exclusion of evidence*

Espinosa contends the trial court erred by precluding Yahaira, Asahel, and D. from testifying about Lopez's alleged sexual molestation of D., his habit of carrying a pocketknife, and his purported reputation for violence. We disagree that any prejudicial error occurred.

a. *Additional facts*

(i) *The prosecutor's requests for discovery*

During jury selection, the prosecutor stated that she had not received any discovery from defense counsel. Defense counsel averred she did not intend to call any witnesses, but would only cross-examine witnesses called by the People. The prosecutor queried whether that would hold true even if the People did not call the witnesses, particularly D. and Haro. Defense counsel responded affirmatively.

Before opening statements, the prosecutor stated she did not intend to call Haro, D., or Yahaira. During opening statement, defense counsel argued that Espinosa was

"protecting his 16 year old sister from his perverted stepfather"; Lopez was "not the kind of person to take no for an answer"; Haro "did what [Lopez] said;" if Lopez "came home and he wanted to watch porn with [Haro], even if she didn't want to, that's what they did"; Haro "didn't say no to him"; and Lopez was the breadwinner and "the boss" and "nobody question[ed]" him.

During the first break in testimony, the prosecutor requested the defense witnesses' statements and averred she lacked discovery regarding the information contained in defense counsel's opening statement. Defense counsel said she would provide witness statements for persons the People did not intend to call after lunch.

At the end of the day, the prosecutor reiterated her request for the witness statements. Defense counsel averred she had not yet decided which witnesses to call and could not make that determination until the People rested. The court stated it would determine later whether counsel had fulfilled her discovery obligations and whether sanctions were warranted.

(ii) *Yahaira's, D.'s, and Asahel's witness statements and defense counsel's offers of proof*

Before the People's last witness testified, defense counsel turned over D.'s witness statement and stated she would disclose which other witnesses the defense intended to call after lunch. The prosecutor again objected to the late discovery. The trial court asked for an offer of proof regarding D.'s testimony. Defense counsel represented that D. would testify Lopez came into her room to take her picture, and that she was afraid. She would also explain "how she was afraid of [Lopez.] How he would wake her up, he poked her. He was in the room in his underwear. He would stare at her body. Her and her girlfriends felt uncomfortable around him. He would stare at their bodies. He would corner her, and he would grab her, caress her legs, grab her by the waist, caress her buttocks and her breasts since she was eight years old."

The prosecutor objected, inter alia, that the proposed testimony was irrelevant. The court agreed, ruling that the basis for D.'s fear and accusations of previous molestation were irrelevant. The court allowed D. to testify to information already

known to the prosecutor regarding events on the night of the murder. It deferred discussion of sanctions "for what I believe was a blatant misrepresentation to this court by [defense counsel]" to a later time.

After the People rested, defense counsel announced she intended to call Yahaira and Asahel, and had dropped their witness statements with the prosecutor's office, but not with the prosecutor herself, during the lunch hour. Consequently, the prosecutor had not seen the statements. The trial court stated: "I'm going to be very candid. [Defense counsel], you have exhibited throughout this entire trial playing games and being, at best, disingenuous with this court. [¶] So whatever else you have that you were taking by the D.A's office, I'll ask you take that out and have [the prosecutor] look at it right now."

After quickly perusing defense counsel's copy of Yahaira's witness statement, the prosecutor described it as follows: "As to Yahaira, the entire statement is basically their childhood growing up, how . . . she believed that the victim was . . . creepy." In response to the trial court's request for an offer of proof, defense counsel represented that Yahaira would testify regarding Lopez's character; his status as the unchallenged "boss" in the family; and his reputation for excessive drinking. The court ruled Yahaira could testify to her observations on the night of the stabbing, but "not about the reputation at this point in time; it has no relevance to these proceedings, based on the evidence before this court."

The prosecutor described Asahel's statement as consisting of information regarding "what happened when he was there," presumably on the night of the murder. It also contained information regarding "the sexual behavior between the victim in this case and [D.]." Defense counsel's offer of proof was simply that Asahel would "contradict Roberto Cortez's testimony." The court ruled Asahel could testify to what he observed on the night of the murder, which "definitely is relevant," but could not testify to the purported sexual molestation. The court ruled that "none of it is relevant, unless your client takes the stand and says this is what I knew, this [is what] I believed."

(iii) *Evidence excluded during the witnesses' testimony*

During Yahaira's direct examination, the court sustained relevance objections to questions about Lopez's drinking habits, his practice of carrying a knife, his military service, his reputation for violence, any sexual basis for D.'s fear, and whether there had been a "peep hole" in the bathroom at the family's previous home.

During D.'s testimony the court sustained relevance objections to questions about Lopez's reputation for being in charge, his military service, his habit of carrying a knife, and some questions regarding a sexual basis for her fear of Lopez.

Before Asahel's testimony, the prosecutor argued defense counsel had unethically continued to question the defense witnesses on topics the court had ruled were inadmissible. She requested sanctions. The court stated the issue of sanctions was premature, but indicated it would likely take "some action" at some point. It opined that defense counsel had been disingenuous and had failed to abide by the court's evidentiary rulings.

The trial court subsequently allowed the defense to recall Yahaira to elicit that she had told Espinosa to keep an eye on D. because she was worried about Lopez molesting D. During discussions on the issue, defense counsel acknowledged D. did not tell anyone about the alleged molestation. The court denied a defense request to recall D. and allow her to testify about the details of Lopez's alleged molestation, because such testimony was "not relevant to these proceedings at all." It also denied the request to recall both Yahaira and D. to testify that Lopez always carried a knife, finding counsel should have asked such questions earlier.

(iv) *Sanctions*

Over a defense objection, the court instructed the jury with CALCRIM No. 306, "Untimely disclosure of evidence."

After the jury retired for deliberations, the prosecutor asked about sanctions. The court replied: "Quite candidly, I was looking at sanctions as far as a jury instruction. After a verdict and sentencing, if the People think that there is something more, certainly we can – you can bring it up at that point in time. But at this point the court would not consider any sanctions . . . until there is a sentencing the court will not." Several months after trial concluded, the court scheduled a hearing pertaining to "formal contempt charges" against defense counsel.[7] The record does not reflect the outcome of any further proceeding on the issue.

b. *Discussion*

(i) *The trial court did not exclude evidence as a discovery sanction.*

Preliminarily, we address Espinosa's contention that the trial court erred by excluding defense evidence as a discovery sanction. Espinosa argues the trial court "made clear" it was excluding testimony about Lopez's character for violence, habit of carrying a knife, and alleged molestation of D. "to punish counsel for her failure to timely disclose evidence." Espinosa acknowledges that "the trial judge did not *say* he was precluding the defense witnesses from testifying as a sanction." However, he argues that because the court "used the word 'sanctions' numerous times in connection with" its rulings, and instructed the jury with CALCRIM No. 306, "a desire to sanction counsel was clearly *underlying* the court's decision to exclude witness testimony."

Espinosa's argument is contradicted by the record. As our discussion of the proceedings, set forth *ante*, makes clear, while the court considered to some extent whether the evidence had been timely disclosed, it did not exclude any evidence as a sanction for defense counsel's failure to comply with discovery obligations. To the contrary, to the extent the challenged evidence was excluded, it was excluded as

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[7] When scheduling the hearing, the trial court stated it believed defense counsel had lied and violated the court's orders; that the People had not received a fair trial; that defense counsel's actions "were contemptuous"; that defense counsel had "absolutely no credibility with this court"; and that "most everything [defense counsel had] said [had] been duplicitous and disingenuous."

irrelevant. Except for the use of CALCRIM No. 306, the trial court viewed the issue of sanctions as premature, and did not definitively address the question until it scheduled a contempt hearing months after trial. Espinosa's argument on this point therefore fails as a factual matter. Accordingly, we do not address Espinosa's contention that exclusion of evidence was an inappropriate sanction.

(ii) *The trial court did not prejudicially err by excluding evidence.*

We turn, then, to the question of whether the challenged evidence was properly excluded as irrelevant. Espinosa argues that evidence Lopez "had been molesting [D.] since she was eight," and Lopez's "reputation for violence and other violent acts" was critical to prove self-defense or the defense of another, thereby establishing the killing was justified or no more than voluntary manslaughter. He contends that the trial court's rulings violated his constitutional right to present a defense, as well as his confrontation clause and due process rights.[8] We disagree.

A. *Relevant legal principles*

Only relevant evidence is admissible. (Evid. Code, § 350.) " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Lopez* (2013) 56 Cal.4th 1028, 1058.) Evidence that tends to corroborate a witness's testimony is relevant. (*People v. Thuss* (2003) 107 Cal.App.4th 221, 233.) A trial court has broad discretion in determining whether evidence is relevant, but lacks discretion to admit irrelevant evidence. (*Lopez,* at p. 1058; *People v. Cowan* (2010) 50 Cal.4th 401, 482.) We apply the abuse of discretion standard to a trial court's rulings on admissibility.

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[8] Espinosa also argues, in supplemental briefing, that the excluded evidence was relevant to show the stabbing was not premeditated, or to demonstrate provocation sufficient to reduce the crime to second degree murder. In light of our conclusion that the evidence was insufficient to prove premeditation and deliberation, these contentions are moot.

(*People v. Fuiava, supra,* 53 Cal.4th at pp. 667-668; *People v. Scott* (2011) 52 Cal.4th 452, 491.)

A criminal defendant has a federal constitutional right to a meaningful opportunity to present a defense. (*People v. Cash* (2002) 28 Cal.4th 703, 727; *Crane v. Kentucky* (1986) 476 U.S. 683, 690.) A state court's application of ordinary rules of evidence generally does not infringe upon this right. (*People v. Cornwell* (2005) 37 Cal.4th 50, 82, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Thornton* (2007) 41 Cal.4th 391, 443.) "A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." (*United States v. Scheffer* (1998) 523 U.S. 303, 308.) The erroneous exclusion of evidence requires reversal only if it is reasonably probable that appellant would have obtained a more favorable result had the evidence been allowed. (Evid. Code, § 354; *People v. Richardson* (2008) 43 Cal.4th 959, 1001.)

Although Espinosa broadly characterizes the excluded evidence as showing the victim was "armed, violent, and had molested appellant's sister," it is far from clear the excluded evidence actually would have established these facts. The witness statements are not part of the appellate record, and to determine what evidence was actually excluded we look to defense counsel's offers of proof and the prosecutor's descriptions of the contents of the witness statements.

B. *Exclusion of evidence regarding Lopez's purported reputation for violence*

Espinosa testified that Lopez told him he had been in the military, and had killed his sergeant and served time in jail; Espinosa had seen a photo of Lopez in his military uniform, holding an assault rifle; Espinosa knew Lopez always carried a folding knife with a four to five-inch blade; Lopez was "kind of aggressive" and "machismo"; and Espinosa was afraid of Lopez in light of this knowledge. He complains the other defense witnesses should have been allowed to corroborate his testimony, thereby bolstering the defense case.

" 'It has long been recognized that where self-defense is raised in a homicide case, evidence of the aggressive and violent character of the victim is admissible.' [Citations.] Under Evidence Code section 1103, such character traits can be shown by evidence of specific acts of the victim on third persons as well as by general reputation evidence. [Citation.]" (*People v. Wright* (1985) 39 Cal.3d 576, 587; see also *People v. Gutierrez* (2009) 45 Cal.4th 789, 827.) Evidence of the victim's violent character may be relevant to prove the defendant's fear of the victim. " 'A person claiming self-defense is required to "prove his own frame of mind," and in so doing is "entitled to corroborate his testimony that he was in fear for his life by proving the reasonableness of such fear." [Citation.]' " (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065-1066; *People v. Davis* (1965) 63 Cal.2d 648, 656.) A defendant may offer the corroborating testimony of a disinterested witness, which may be given more credence by a jury. (*Davis*, at pp. 656-657.)

The record here fails to demonstrate that any significant evidence on this topic was excluded. Assuming arguendo that D., Asahel, or Yahaira would actually have testified that Lopez was in the military in El Salvador years before the murder,[9] their testimony was properly excluded as it was, at best, marginally relevant and cumulative. A victim's military service, without more, is not evidence of his or her violent character. In any event, the People's witness, Cortez, already had testified during cross-examination that Lopez told him he had been in the military in El Salvador. The jury had no reason to disbelieve Cortez. The siblings' testimony would have added nothing to the evidence already adduced.

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9 It is not clear, based on defense counsel's offers of proof, that these witnesses would actually have testified as Espinosa now suggests.

The court did not err by excluding evidence the siblings had been told, presumably by Lopez, that Lopez had killed his sergeant in El Salvador and served time in jail.[10] This evidence was so nonspecific and attenuated as to lack probative value. There were no details provided regarding the circumstances of the purported killing, which allegedly occurred years before the stabbing. There was a dearth of evidence Lopez behaved violently toward or threatened anyone in the Espinosa family during the seven years he lived with them. Espinosa told the detectives he had never gotten in a physical altercation with Lopez before, and only had "problems" with him once or twice. The other witnesses' testimony on this point corroborated that Lopez had never been violent with his family. Thus, Lopez's purported crime years before, in an entirely different context, shed no light on his character for violence within his family at the time of the stabbing. (See *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448, fn. 4 ["At some point in time . . . evidence of the victim's character becomes too remote to have any probative value and thus becomes irrelevant"]; *People v. Gonzales* (1967) 66 Cal.2d 482, 500 [reputation for violence seven years before the acts in question was too remote to have probative value].) Although Espinosa argues that Lopez's purported molestation of D. was "violent," neither defense counsel's offer of proof nor any other evidence suggested he ever used force or violence against her.

The exclusion of evidence Lopez habitually carried a knife presents a closer case.[11] Contrary to Espinosa's assumptions, the evidence Lopez habitually carried a knife does not, without more, show he had a violent character. There was no evidence proffered or admitted that Lopez ever used or brandished the knife to harm or threaten

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10 Again, defense counsel's offers of proof did not specifically address the siblings' testimony on this point, and we assume for purposes of argument only that they would have testified Lopez informed them of the purported killing.

11 Contrary to Espinosa's assertion in his supplemental brief, there was no evidence Lopez was "armed" on the night of the stabbing, and the court did not exclude any such evidence.

anyone. The mere fact an individual typically carries a knife on his or her person does not indicate a character for violence. Thus, evidence Lopez carried a knife did not provide probative evidence demonstrating he was violent, and did not support any inference that he was likely to stab D., as Espinosa avers. To the extent the evidence was offered for this purpose, it was properly excluded.

That Lopez was generally armed was potentially relevant, however, to the jury's consideration of whether Espinosa actually believed, reasonably or unreasonably, that Lopez was about to stab him. In this regard, his siblings' opinions were of limited relevance: only Espinosa's own belief about the knife was directly relevant. As noted, there was no evidence Lopez ever used the knife in a violent fashion and no evidence he was ever in a physical altercation with Espinosa, or anyone in the family. The jury was therefore unlikely to credit Espinosa's testimony that he believed Lopez – who had supported the family for seven years and never engaged in any violent conduct – was about to stab him, armed or not. Contrary to Espinosa's assertions, there was no proffered evidence suggesting Lopez was "prone to violent conduct."

C. *Evidence of the victim's purported molestation of D.*

Espinosa argues the trial court erred by omitting evidence that Lopez had molested D. because such evidence (1) would have corroborated his statements to police and (2) would have shown the killing was voluntary manslaughter, in that he killed Lopez because he believed D. was in imminent danger. We conclude that even if exclusion of this evidence was error, it was harmless under any standard.

(i) *Applicable legal principles*

"The doctrine of self-defense embraces two types: perfect and imperfect." (*People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1168.) "Perfect" self-defense requires that a defendant have an honest and reasonable belief in the need to defend himself or herself. (*Ibid.*; *People v. Battle* (2011) 198 Cal.App.4th 50, 72-73.) Imperfect self-defense arises when the defendant kills under the actual but unreasonable belief that the killer, or another person, was in imminent danger of death or great bodily injury. (*People v. Booker* (2011) 51 Cal.4th 141, 182; *People v. Duff* (2014) 58 Cal.4th 527, 561.) For

either theory to apply, the defendant must have had an *actual fear* of *imminent* harm. (*People v. Butler* (2009) 46 Cal.4th 847, 868; *Battle,* at pp. 72-73.) " ' "Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of imminent danger to life or great bodily injury." [Citation.]' [Citation.] All the surrounding circumstances, including prior assaults and threats, may be considered in determining whether the accused perceived an imminent threat of death or great bodily injury." (*Battle,* at p. 72; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1083.) "Perfect" self-defense is a complete defense to murder or manslaughter. (*People v. Randle* (2005) 35 Cal.4th 987, 994, overruled on other grounds in *People v. Chun, supra,* 45 Cal.4th at p. 1201.) Where a defendant kills in imperfect self-defense, the offense is reduced from murder to manslaughter. (*People v. Beltran* (2013) 56 Cal.4th 935, 951.)

A killing may also be reduced from murder to voluntary manslaughter if it occurs upon a sudden quarrel or in the heat of passion on sufficient provocation. (*People v. Beltran, supra,* 56 Cal.4th at p. 942; *People v. Manriquez* (2005) 37 Cal.4th 547, 583.) "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201; *Beltran,* at p. 942; *People v. Enraca* (2012) 53 Cal.4th 735, 759.) "The provocation which incites the defendant to homicidal conduct . . . must be caused by the victim [citation] or be conduct reasonably believed by the defendant to have been engaged in by the victim" (*People v. Lee* (1999) 20 Cal.4th 47, 59), and must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*Beltran,* at p. 939; *Enraca,* at p. 759; *Lee,* at p. 59.) The defendant must have killed "while under 'the actual influence of a strong passion' induced by [adequate] provocation." (*People v. Moye* (2009) 47 Cal.4th 537, 550.)

Espinosa's jury was instructed on perfect self-defense, voluntary manslaughter on both heat of passion and imperfect self-defense theories, first degree murder, and second degree murder. It was also instructed that provocation may reduce a murder from first to second degree murder.

(ii) *Discussion*

The evidence excluded by the court on this issue was D.'s proposed testimony that since she was eight years old, Lopez would wake her up, poke her, come into her room in his underwear, stare at her and her female friends' bodies, making them uncomfortable, corner her, grab her, and caress her buttocks, legs, and breasts.[12] We also assume arguendo, based on defense counsel's questioning, that Yahaira would have testified there was a "peephole" in the bathroom at their former home.

Assuming arguendo some or all of D.'s testimony was excluded in error, we discern no prejudice. Even if Lopez had molested D. in the past,[13] the evidence was irreconcilable with a finding that Espinosa acted in "perfect" defense of D. To so find, the jury would have had to conclude Espinosa reasonably believed D. was in *imminent danger* of physical harm on the night of the stabbing. That Lopez purportedly leered at her, poked her, inappropriately caressed her, or furtively observed her through a peephole in the past did not show she was in imminent danger on the night of the stabbing.

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[12] Contrary to Espinosa's brief, the evidence in the record does not suggest Yahaira could have testified to these facts. Defense counsel did not include them in her offer of proof regarding Yahaira, and in fact acknowledged that D. never told anyone Lopez had molested her. Espinosa also avers the court excluded testimony by Detective Acevedo that Lopez "had been molesting [D.]." Espinosa appears to be referring to the fact the trial court sustained a relevance objection to defense counsel's question whether D. ever told Acevedo that Lopez had molested her. However, the record before us does not include any indication that such evidence existed.

[13] We do not suggest that the victim was guilty of such conduct. The trial court opined, in posttrial proceedings, that "the evidence that was presented or attempted to be presented that Mr. Lopez in some way was abusive or was molesting somebody in the family is patently false" and the allegations were "absolutely repugnant."

Lopez's purported attempt to photograph D. as she slept, even viewed with the sinister connotation the defense ascribed to it, posed no threat to her. She was clad in sweats and a tank top and covered by bedding, and any photograph Lopez attempted therefore would not have been lewd. Her 18-year-old brother Asahel was sleeping in the bedroom with her; Espinosa was awake and had challenged Lopez's conduct; and D.'s mother and a houseguest were feet away in the living room. When Espinosa confronted him, Lopez left D.'s bedroom. Under these circumstances, no reasonable jury could have concluded that Lopez was actually about to return to D.'s and Asahel's bedroom and molest or "gravely injure" D., as Espinosa suggests.

As to the claim of imperfect self-defense, Espinosa never asserted that he killed Lopez because he thought Lopez would molest or hurt D. Instead, he consistently claimed he stabbed Lopez to protect *himself*. Espinosa told detectives, and testified at trial, that Lopez pushed him several times and said "I'll knock you out type of thing" or "you don't want to mess with me because I'll beat you up." Espinosa told detectives he "thought [Lopez] was gonna hit me," panicked, and stabbed him. When asked at trial, "Why did you stab him," Espinosa replied, "I was scared. *I thought that he was going to hurt me.*" (Italics added.) That Lopez purportedly leered at or improperly touched D. in the past had no bearing on either the genuineness or reasonableness of Espinosa's purported fear Lopez would harm him on the night of the murder. Thus, the excluded evidence could not have bolstered an imperfect self-defense theory.

For the same reasons, the excluded molestation evidence could not have established that Espinosa committed only voluntary manslaughter. By Espinosa's own account, he stabbed Lopez because he was afraid Lopez was going to hurt him, not because he was angry about the purported past molestation of D. Espinosa did not tell police he believed Lopez had been molesting D., even though the detectives asked whether he had ever had problems with Lopez in the past. Espinosa did not testify at trial that he killed because he was angry that Lopez had molested D.

Moreover, the trial court admitted considerable evidence corroborating Espinosa's testimony regarding Lopez's alleged sexual attraction to D. Yahaira testified that she had asked Espinosa to keep an eye on D. because she believed Lopez had been sexually molesting her. D. testified that Lopez "gave [her] a bad feeling," it was not unusual for Lopez to come into her bedroom in the middle of the night, and she was afraid of him; she attempted to lock her door to keep him out; and she was afraid he would come back into her room. Espinosa testified that he believed Lopez was sexually attracted to D., and stared at her inappropriately. It was undisputed that Lopez had taken two photos of D. with his cellular telephone earlier that day, lending credence to Espinosa's account. In sum, it is clear that, under any standard, exclusion of the evidence was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Paniagua* (2012) 209 Cal.App.4th 499, 524.)

Espinosa argues that "[s]ince molestation is an act of violence, [D.] should have been permitted to testify about the fact that the decedent molested her because 'extrinsic corroborating evidence of the victim's acts of violence is admissible to show defendant's state of mind' and corroborate his claim that 'he knew of the victim's prior acts of violence.' " In support, he cites three Ninth Circuit cases, *U.S. v. Saenz* (9th Cir. 1999) 179 F.3d 686; *DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, and *U.S. v. James* (9th Cir. 1999) 169 F.3d 1210. None of these cases assist him. For one thing, there was no showing D. ever told Espinosa that Lopez was purportedly molesting her; Espinosa never testified that she had, and defense counsel acknowledged that D. never disclosed the purported molestation to anyone. Moreover, the cited cases are distinguishable on their facts.

3. *Purported instructional errors*

a. *Failure to instruct on defense of another*

As noted, the trial court instructed the jury on self-defense and on voluntary manslaughter on heat of passion and imperfect self-defense theories. Defense counsel requested that the jury also be instructed on homicide in defense of another, on the theory that Espinosa killed Lopez because he believed Lopez was going to molest D. Defense

counsel averred that Lopez was "trying to get at the daughter" and "have his way with her." The trial court refused the instruction, concluding there was no substantial evidence to support it. Espinosa complains this ruling was structural error, and violated his right to have the jury determine all issues. Although defense counsel did not request an instruction on imperfect defense of others, Espinosa avers the court should have instructed on this theory as well. (See *People v. Randle, supra,* 35 Cal.4th at pp. 996-997.) We disagree. Because there was insufficient evidence supporting either instruction, the trial court correctly omitted them.

In a criminal case, a trial court must instruct, sua sponte, on the general principles of law relevant to the issues raised by the evidence, including lesser included offenses, and defenses on which the defendant relies or that are not inconsistent with his theory of the case. (*People v. Moye, supra,* 47 Cal.4th at p. 548; *People v. Abilez, supra,* 41 Cal.4th at p. 517.) Instructions on a lesser included offense must be given only when there is substantial evidence from which the jury could conclude the defendant is guilty of only the lesser offense. (*People v. Thomas* (2012) 53 Cal.4th 771, 813; *People v. Manriquez, supra,* 37 Cal.4th at p. 584.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*People v. Benavides, supra,* 35 Cal.4th at p. 102.) In deciding whether there is substantial evidence of a defense or a lesser included offense, we do not evaluate the credibility of the witnesses, a task for the jury. (*Manriquez,* at p. 585.) The duty to instruct on lesser included offenses is not satisfied by instructing on only one theory of an offense if other theories are supported by the evidence. (*People v. Lee, supra,* 20 Cal.4th at p. 61.) We independently review the question of whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Booker, supra,* 51 Cal.4th at p. 181.) We have set forth the elements of defense of others and imperfect defense of others *ante.*

As our analysis of Espinosa's exclusion of evidence claims makes clear, there was insufficient evidence to support the proffered instructions. There was no evidence Espinosa actually believed killing Lopez was necessary to protect D., nor was there

evidence she was in imminent danger.[14] (See *People v. Duff, supra*, 58 Cal.4th at p. 561.) The absence of such evidence is fatal to the defense of others and imperfect defense of others claims. Therefore, the trial court properly refused the requested instructions. For the same reasons, Espinosa has failed to prove prejudice, as there is no showing he would have obtained a more favorable outcome had the instructions been given. (See *People v. Randle*, *supra*, 35 Cal.4th at p. 1003.)

b. *CALCRIM No. 306*

At the prosecutor's request, and over defense objection, the trial court instructed with CALCRIM No. 306, "Untimely disclosure of evidence." That instruction provided: "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the defense failed to disclose: any information about victim Lopez being in the El Salvadorian Army, that victim Lopez ever carried a pocket knife or that victim Lopez had ever acted inappropriate with female [*sic*], young or old, within the legal time period. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure. [¶] However, the fact that the defendant's attorney failed to disclose evidence within the legal time period is not evidence that the defendant committed a crime."

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14 We note that much of the "evidence" Espinosa cites throughout his briefing is based on mischaracterizations of the record. For example, contrary to Espinosa's assertions, Cortez did not testify that Lopez "came out of [D.]'s room and he had a knife on him when appellant approached and stabbed him." Cortez testified that Lopez was cutting lemons in the kitchen with a knife, not that he came out of D.'s room with a knife; he also testified he did not see a knife in Lopez's hand when Espinosa attacked. There was no testimony that Espinosa pushed Lopez away from D. in her bedroom. The evidence showed that when Espinosa confronted him, *Lopez* pushed *Espinosa* toward the bedroom door and out into the hall. Espinosa never testified that "he had reason to fear that [Lopez] would try to kill or gravely injure [D.]."

Espinosa contends instruction with CALCRIM No. 306 was improper because (1) there was no discovery violation, and (2) the instruction is flawed. We agree that the instruction was erroneous. In light of the fact we are reducing Espinosa's crime to second degree murder, however, we discern no prejudice.

(i) *Was there a discovery violation?*

Espinosa avers that there was no discovery violation because the undisclosed statements came from prosecution witnesses, and were intended to be used in cross-examination. "In criminal proceedings, under the reciprocal discovery provisions of section 1054 et seq., all court-ordered discovery is governed exclusively by – and is barred except as provided by – the discovery chapter . . . . [Citations.]" (*In re Littlefield* (1993) 5 Cal.4th 122, 129, fn. omitted; *People v. Jordan* (2003) 108 Cal.App.4th 349, 357-358; *Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1167.) Under section 1054.3, subdivision (a), the defense must disclose to the prosecution the names and addresses of persons, other than the defendant, that it intends to call as witnesses at trial and their written or oral statements.[15] (*People v. Riggs* (2008) 44 Cal.4th 248, 305-306; *Jordan*, at pp. 357-358.) The phrase "intends to call" means persons the party reasonably anticipates it is likely to call at trial. (*Riggs*, at p. 305; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 375-376 & fn. 11; *In re Littlefield*, at p. 130.) The determination whether to call a witness is peculiarly within the discretion of counsel. (*Hubbard*, at p. 1170.) The disclosure must be made 30 days before trial or, if counsel becomes aware of a witness after that time, immediately. (§ 1054.7.) If disclosure is not timely made as to any particular witness, the trial court may inform the jury of the failure to disclose.

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15 Section 1054.3, subdivision (a), provides: "The defendant and his or her attorney shall disclose to the prosecuting attorney: [¶] (1) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial. [¶] (2) Any real evidence which the defendant intends to offer in evidence at the trial."

(§ 1054.5, subd. (b); *Riggs,* at p. 306.) However, "the defense is not required to disclose any statements it obtains from prosecution witnesses that it may use to refute the prosecution's case during cross-examination." (*Izazaga,* at p. 377, fn.14; *Hubbard, supra,* at p. 1165.)

Here, Yahaira and D. were apparently on the People's witness list. Defense counsel expected the People to call them, and averred she intended to elicit the information in their statements during cross-examination. Thus, she had no duty to disclose the witnesses' statements prior to trial. (*Izazaga, supra,* 54 Cal.3d at p. 377, fn. 14.)

On Tuesday, November 13, during jury selection, defense counsel averred that she would not call D. as a witness, even if the People likewise did not call her. On Friday, November 16, shortly before opening statements, the prosecutor stated she would not call Yahaira or D. At this point, it became incumbent upon defense counsel to turn over their statements if she "reasonably anticipated" calling them for the defense. (*People v. Riggs, supra,* 44 Cal.4th at p. 305; *In re Littlefield, supra,* 5 Cal.4th at p. 130.) Counsel must have anticipated calling them, because her opening statement contained information that presumably came from them. Nevertheless, she did not turn over their statements until just before the witnesses testified. This resulted in the prosecutor having only a brief period – indeed, in the case of Yahaira only minutes – to review the statements before examination commenced. Accordingly, substantial evidence supported the court's finding that defense counsel failed to comply with the discovery statute. (See *People v. Riggs, supra,* 44 Cal.4th at p. 306.)[16]

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16 The People argue that defense counsel also committed a discovery violation by failing to turn over Asahel's statement. However, it does not appear that the People made representations regarding whether they would call Asahel. Therefore the defense could have been unaware Asahel would be unavailable for cross-examination until the People rested. Moreover, Asahel did not testify about any of the topics listed in the instruction. Accordingly, the disclosure of Asahel's witness statement is irrelevant to the propriety of instruction with CALCRIM No. 306.

(ii) *CALCRIM No. 306*

Espinosa next contends that use of CALCRIM No. 306 was improper because the prosecution was not prejudiced by any discovery violation; moreover, the instruction is flawed in that it did not specify how jurors could use the information about the discovery violation, thereby permitting them to consider counsel's malfeasance when assessing guilt. In making this argument, Espinosa relies primarily on four cases that criticized the *predecessor* to CALCRIM No. 306, CALJIC No. 2.28. (*People v. Lawson* (2005) 131 Cal.App.4th 1242; *People v. Bell* (2004) 118 Cal.App.4th 249 (*Bell*); *People v. Cabral* (2004) 121 Cal.App.4th 748; *People v. Saucedo* (2004) 121 Cal.App.4th 937.)

People v. Bell held that the trial court committed prejudicial error by giving CALJIC No. 2.28, regarding the late disclosure of statements given by alibi witnesses. (*Bell, supra,* 118 Cal.App.4th at p. 251.) That instruction provided in pertinent part: " 'The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of truth, save court time and avoid any surprise which may arise during the course of the trial. Delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence. [¶] . . . In this case, the Defendant failed to timely disclose [the statements of three alibi witnesses]. . . . The weight and significance of any delayed disclosure are matters for your consideration. However, you should consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial or subject matters already established by other credible evidence.' " (*Id.* at p. 254.)

Bell reasoned that the instruction was defective in several respects. It inaccurately stated that the defendant failed to make timely disclosure, whereas the failure was counsel's. (*Bell, supra,* 118 Cal.App.4th at pp. 254-255.) Although the jurors were told that the weight and significance of any delayed disclosure were matters for their consideration, the instruction provided "no guidance on how this failure might legitimately affect their deliberations." (*Id.* at p. 255.) There was no evidence the tardy disclosure actually disadvantaged the prosecution, and the instruction left jurors to

speculate on the question. "Further, if there were no diminution of the People's right to subpoena witnesses or present rebuttal, it is unclear how the jurors were to evaluate the weight of the potentially affected testimony. Certainly, in the absence of any practical impact on the factfinding process . . . the jurors were not free to somehow fashion a punishment to be imposed on Bell because his lawyer did not play by the rules. [¶] The instruction implied that the jurors should 'do something' but they were given no idea what that something should be. Their alternatives were severely limited. They could disbelieve, discount, or look askance at the defense witnesses. But it is not clear why, or to what extent, they should do so in the absence of evidence that the prosecution was unfairly prevented from showing that the witnesses were unreliable." (*Id.* at p. 255.) Unlike other instructions regarding consciousness of guilt, CALJIC No. 2.28 did not clarify that such evidence is not of itself sufficient to prove guilt. Jurors in Bell's case "may have concluded they were free to find Bell guilty merely because he failed to comply with the discovery statute." (*Bell,* at p. 256.) The prosecution's evidence was not overwhelming, the alibi evidence was a critical part of the defense case, the instruction unfairly undermined the testimony of the alibi witnesses, and the prosecutor argued the late discovery showed the alibi evidence was "drummed up." (*Id.* at p. 257.) Accordingly, reversal was required under *People v. Watson, supra,* 46 Cal.2d at page 836. (*Bell,* at p. 257; accord, *People v. Cabral, supra,* 121 Cal.App.4th at pp. 750-753 [reversing judgment due to instruction with CALJIC No. 2.28]; *People v. Lawson, supra,* 131 Cal.App.4th at pp. 1248-1249; *People v. Saucedo, supra,*121 Cal.App.4th at p. 942 [CALJIC No. 2.28 encourages speculation and offers insufficient direction].)

Our Supreme Court has not yet ruled on the propriety of CALCRIM No. 306, but considered predecessor instructions in *People v. Riggs, supra,* 44 Cal.4th 248 and *People v. Thomas* (2011) 51 Cal.4th 449 (*Thomas*). In *Riggs,* the defendant, who represented himself at trial, failed to disclose alibi witnesses until after the prosecution completed its guilt phase case-in-chief. The trial court gave a precursor instruction that was similar to CALJIC No. 2.28. (*Riggs,* at pp. 305-306.) *Riggs* expressly declined to address the propriety of either CALJIC No. 2.28 or CALCRIM No. 306, but concluded that under the

circumstances, there was no error and no prejudice. (*Riggs*, at pp. 306-307.) In considering the "important concern voiced in *Bell* . . . that the instruction given in that case did not provide explicit guidance to the jury regarding why and how the discovery violation would be relevant to its deliberations," the court concluded that use of the instruction was not limited to instances in which a discovery violation had an actual effect on the other party's ability to respond to the evidence. (*Id.* at p. 308.) "Were a jury to find a defendant had failed to disclose evidence to the prosecution in an attempt to hide the evidence until the last minute, the jury could reasonably infer from the fact that the defendant thereby violated his or her duty under the discovery statutes that even the defense did not have much confidence in the ability of its own evidence to withstand full adversarial testing. Whether or not the prosecution was actually impaired by the attempt to conceal the evidence would not change the circumstance that defendant tried to inhibit the prosecution's efforts. In other words, while not constituting evidence of the defendant's consciousness of his or her own guilt, the fact of a discovery violation might properly be viewed by the jury as evidence of the defendant's consciousness of the lack of credibility of the evidence that has been presented on his or her behalf. In *Bell*, the trial court had found that no attempt to gain a tactical advantage was behind the failure to timely disclose the evidence at issue, so that inference was factually unavailable in that case. [Citation.] No such finding was made in [*Riggs*], and the trial court therefore did not err by giving the instruction, despite there being no indication that the prosecution was actually affected by the late disclosure." (*Id.* at pp. 308-309, fn. omitted; see also *People v. Nguyen* (2015) 61 Cal.4th 1015, 1064.) Moreover, use of the instruction, even if error, was not prejudicial because the evidence was overwhelming and the alibi testimony was dubious. (*Id.* at p. 311.)

In *Thomas*, the trial court gave the 1996 version of CALJIC No. 2.28. The Supreme Court agreed with *Bell* that CALJIC No. 2.28 was defective. (*Thomas*, *supra*, 51 Cal.4th at pp. 483-484.) As relevant here, the court reasoned it "was deficient in informing the jury that ' "[t]he weight and significance of any delayed disclosure are matters for your consideration," ' because it offered 'no guidance on how this failure

might legitimately affect their deliberations' [citation]. As in *Bell*, there was no evidence that the 'tardy disclosure' had actually deprived the prosecutor 'of the chance to subpoena witnesses or marshal evidence in rebuttal,' " because the prosecutor had declined the trial court's offer of a continuance and vigorously cross-examined the tardily identified expert. Therefore, the trial court erred in giving CALJIC No. 2.28. (*Id.* at pp. 483-484.) The court observed in a footnote that "CALJIC No. 2.28 has since been modified to address the concerns expressed in [*People v. Bell*] and its progeny." (*Thomas*, at p. 484, fn. 6.)

Based on the foregoing, we conclude CALCRIM No. 306 was given in error here. To be sure, CALCRIM No. 306 cured many of the defects present in CALJIC No. 2.28. CALCRIM No. 306 told jurors that "[a]n attorney for the defense" failed to make timely disclosures, thereby differentiating between counsel and Espinosa. The instruction also advised that the fact Espinosa's attorney failed to make timely disclosures was "not evidence that the defendant committed a crime." But like the predecessor instruction, CALCRIM No. 306 failed to provide sufficient guidance on how the untimely disclosure might affect the jury's deliberations, which was problematic here given that there was no evidence the tardy disclosures disadvantaged the People. While the instruction told jurors they might consider the effect of the late disclosure, no evidence was before the jury demonstrating what the effect might have been. The jurors were "simply left to speculate." (*People v. Bell, supra,* 118 Cal.App.4th at p. 255; *People v. Saucedo, supra,* 121 Cal.App.4th at p. 942.) Given that there was no evidence the People were disadvantaged, no showing whether the tardy disclosure had any effect, and the advice that the delayed disclosure was not evidence Espinosa committed a crime, it is unclear how the jury was supposed to evaluate the evidence. As in *Bell*, the "instruction implied that the jurors should 'do something' but they were given no idea what that something should be." (*Bell*, at p. 255.)

Moreover, apart from the question of whether the pattern instruction is correct as a general matter, here it was flawed because it was overbroad. It informed jurors that an attorney for the defense failed to disclose information about Lopez's service in the

Salvadoran army, or his habit of carrying a pocket knife. But the trial court prohibited any witness except Espinosa from testifying as to these matters. Because the evidence was excluded, the instruction inappropriately referenced it.

Nonetheless, because we are reducing the offense to second degree murder, we discern no prejudicial error. The evidence Espinosa killed Lopez was undisputed. The only real question was whether the murder was of the first or second degree, or was voluntary manslaughter. Evidence Espinosa reasonably believed Lopez carried a pocketknife was unlikely to significantly improve his chances of obtaining a more favorable verdict. There was no showing Lopez ever brandished or used the knife in a violent manner during the seven years he lived with Espinosa's family, and there was no showing he and Espinosa had ever been in a physical altercation. The evidence about Lopez's military service was largely lacking in probative value, as we have discussed *ante*; moreover, it was undisputed Lopez had served in the military given that the People's witness, Cortez, testified Lopez had told him of his service. As to evidence that Lopez purportedly molested D., as noted, Espinosa did not testify that he stabbed Lopez because he was enraged about any purported molestation, or about the photograph; he testified that he stabbed Lopez because he thought Lopez was going to hurt him.

The primary way in which CALCRIM No. 306 harmed the defense case was to unfairly undermine Espinosa's credibility based on his counsel's failings and gamesmanship, a circumstance relevant to the jury's finding that the crime was premeditated and deliberate. If the jury credited the People's theory, Espinosa became angry when Lopez asked why he did not have a job, retrieved an icepick from the bedroom, concealed it with his sweatshirt, and ambushed Lopez with it. If, on the other hand, the jury credited Espinosa's account, there was no weapon retrieval or concealment and no evidence of premeditation or deliberation. Espinosa told police, and testified, that he and Lopez argued about the picture-taking, and he stabbed Lopez after Lopez pushed and threatened him, using an icepick and knife that he grabbed in the kitchen. Thus, if the jury credited Espinosa's account, there was no evidence of premeditation and deliberation. By implying that the defense case was fabricated – a

theme the prosecutor repeatedly stressed during argument – CALCRIM No. 306 unfairly undercut Espinosa's testimony. However, because we are reducing the crime to second degree murder, use of the instruction was harmless.

4. *Cumulative error.*

Espinosa contends that the cumulative effect of the purported errors deprived him of due process. As we have " 'either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial,' " we reach the same conclusion with respect to the cumulative effect of any purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236; *People v. Butler, supra*, 46 Cal.4th at p. 885.)

5. *There is insufficient evidence of premeditation and deliberation to support the first degree murder verdict.*

Espinosa contends the evidence was insufficient to support the jury's finding of premeditation and deliberation. We agree.

a. *Applicable legal principles*

When determining whether the evidence was sufficient to sustain a criminal conviction, " ' "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.]' " (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104; *People v. Johnson* (2015) 60 Cal.4th 966, 988.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence. (*People v. Brown* (2014) 59 Cal.4th 86, 106.) We must accept logical inferences the jury might have drawn from the evidence even if we would have concluded otherwise. (*People v. Solomon* (2010) 49 Cal.4th 792, 811-812.)

Murder is an unlawful killing committed with malice aforethought. (§ 187, subd. (a); *People v. Elmore* (2014) 59 Cal.4th 121, 132.) Murder is of the first degree when it is committed in a willful, deliberate and premeditated fashion. (§ 189; *Elmore*, at p. 133; *People v. Beltran*, *supra*, 56 Cal.4th at p. 942.) Premeditation and deliberation require more than a showing of intent to kill. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1069; *People v. Halvorsen* (2007) 42 Cal.4th 379, 419; *People v. Boatman* (2013) 221 Cal.App.4th 1253 (*Boatman*).) An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection, rather than as the product of an unconsidered or rash impulse. (*People v. Pearson* (2013) 56 Cal.4th 393, 443; *People v. Burney* (2009) 47 Cal.4th 203, 235.) "Deliberate" means formed, arrived at, or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. (*People v. Houston* (2012) 54 Cal.4th 1186, 1216; *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) "Premeditation" means thought over in advance. (*People v. Solomon*, *supra*, 49 Cal.4th at p. 812.) The " 'process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ." [Citations.]' [Citation.]" (*People v. Bolin*, *supra*, 18 Cal.4th at p. 332.)

A reviewing court typically considers three types of evidence when determining whether a finding of premeditation and deliberation is adequately supported: "(1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing -- what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manne*r of killing was so

particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27; *People v. Gonzalez* (2012) 54 Cal.4th 643, 663-664; see *People v. Romero* (2008) 44 Cal.4th 386, 401.) However, these so-called *Anderson* factors are not exclusive, are not all required, need not be accorded any particular weight, and are not invariably determinative. (*Gonzalez*, at p. 663; *People v. Houston*, *supra*, 54 Cal.4th at p. 1216; *People v. Manriquez*, *supra*, 37 Cal.4th at p. 577.) The *Anderson* factors were simply intended as a framework to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. (*People v. Houston*, at p. 1216; *Gonzalez*, at pp. 663-664; *People v. Halvorsen*, *supra*, 42 Cal.4th at p. 420; *People v. Koontz*, *supra*, 27 Cal.4th at p. 1081.) Our Supreme Court has reiterated that " '[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate.' " (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 294.)

b. *Application here*

There was no evidence Espinosa had a preexisting motive to kill Lopez. "The second *Anderson* factor refers not merely to a motive to kill, but to the kind of motive that 'would in turn support an inference that the killing was the result of "a pre-existing reflection" and "careful thought and weighing of considerations" *rather than* "mere unconsidered or rash impulse hastily executed." ' [Citation.]" (*Boatman*, *supra*, 221 Cal.App.4th at p. 1268.) Lopez had lived with Espinosa and his family for seven or eight years. It was undisputed that during that time, the two men never engaged in a physical confrontation, and they had had disagreements or "problems" only once or twice. There was evidence of an unpleasant encounter between them five to ten minutes before the stabbing. According to Cortez, Lopez angrily asked Espinosa why he didn't have a job; Espinosa did not respond. After the stabbing, Espinosa told his cousin Cervantes that he and Lopez "got into an altercation of sorts, and his . . . mother and [Lopez] had kicked him out of the house." Lopez had "put[ ] him down" and pushed

him. The People argue that this evidence showed Espinosa felt "disrespected and insulted," which "served as the motivation to kill Lopez." Espinosa testified that he and Lopez quarreled when Lopez tried to take a picture of D.

These events, however, did not provide evidence of a *preexisting* motive. In *People v. Boatman,* for example, there was evidence the defendant and the victim, his girlfriend, were embroiled in a "loud screaming argument" a "couple of minutes" before the defendant shot her, and that she had sent text messages to a friend indicating they had been fighting shortly before the murder. (*Boatman, supra,* 221 Cal.App.4th at pp. 1258, 1261, 1268.) *Boatman* rejected the view that these facts demonstrated motive. It explained that the "text messages and the evidence of a loud screaming argument" did not show a preexisting motive suggesting careful thought and reflection. "To the contrary, any evidence of defendant's 'bad mood' or 'anger with the victim' indicates a motive to kill based on ' "unconsidered or rash impulse hastily executed," ' not the sort of ' "pre-existing reflection" ' and ' "careful thought and weighing of considerations" ' required to find premeditation and deliberation." (*Boatman, supra,* at p. 1268.) The same is true here. The evidence showed that the killing was the result of a spur-of-the-moment argument, suggesting a rash or impulsive act, not a killing resulting from careful thought and deliberation. As in *Boatman,* evidence that Espinosa and Lopez argued minutes before the stabbing does not provide evidence of a preexisting motive to kill.

Nor did the manner of killing indicate premeditation and deliberation. Unquestionably, the manner of killing was vicious and brutal, and evidenced an unmistakable intent to kill. Espinosa stabbed Lopez 17 times with two weapons, including two blows that penetrated Lopez's skull and required considerable force. The fact a killing is vicious or frenzied does not necessarily defeat a finding of premeditation and deliberation. Multiple wounds demonstrate the intent to kill, which is consistent with premeditation and deliberation. (See, e.g., *People v. Prince* (2007) 40 Cal.4th 1179, 1253; *People v. Elliot* (2005) 37 Cal.4th 453, 471; *People v. San Nicolas* (2004) 34 Cal.4th 614, 658-659.) However, while this manner of killing would not *preclude* a finding of premeditation and deliberation if other evidence existed, it was neither

particular nor exacting, and does not support a conclusion Espinosa killed according to a preconceived design. Instead, the manner of killing evidence indicates an unconsidered or rash impulse hastily executed. "It is well established that the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation. 'If the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weighing of considerations.' " (*People v. Anderson, supra,* 70 Cal.2d at pp. 24-25; see also *People v. Alcala* (1984) 36 Cal.3d 604, 626 ["The fact that a slaying was unusually brutal, or involved multiple wounds, cannot alone support a determination of premeditation. Absent other evidence, a brutal manner of killing is as consistent with a sudden, random 'explosion' of violence as with calculated murder"]; *People v. Wharton* (1991) 53 Cal.3d 522, 548 [multiple blows to the skull from a blunt instrument did not indicate a preconceived design to kill].) As *People v. Nazeri* (2010) 187 Cal.App.4th 1101 explained, the infliction of multiple stab wounds "is, at least in a vacuum, associated with someone losing his mind and going berserk, which is not a state of mind we associate with premeditation or deliberation. We note an irony here: The more genteel the form of dispatch, the more readily premeditation may be inferred. Vicious brutal knifings, particularly when the victim is awake and fighting back, tend to fall on the opposite side of the spectrum from, say, the administration of arsenic in a guest's tea." (*Id.* at pp. 1118 [concluding the infliction of multiple stab wounds showed intent to kill, which, along with evidence of planning and abundant evidence of preexisting motive, was sufficient to support the jury's finding of premeditation and deliberation].) Here, the evidence showed the numerous wounds Espinosa inflicted on Lopez were all delivered in a single, frenzied attack that lasted one minute. There was no evidence Espinosa reflected on his actions between the blows. (Cf. *People v. Lewis* (2009) 46 Cal.4th 1255, 1293 [defendant's additional act of slashing the victim's throat after the victim had been strangled to the point of unconsciousness indicated a reasoned decision to kill].) The manner of killing does not provide evidence of premeditation or deliberation.

Thus we turn to evidence of planning, the most important prong of the *Anderson* test. (*People v. Alcala, supra,* 36 Cal.3d at p. 627; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1238.) The primary evidence upon which the People relied to show planning was Cortez's testimony that (1) Espinosa put on a sweatshirt; (2) Espinosa had the knife in his hand when he entered the kitchen; and (3) the absence of defensive wounds indicated Lopez was ambushed by the attack. The People argue the jury could have reasonably inferred that within the five minutes "after an angry altercation with his stepfather, appellant located the ice pick, put on his sweatshirt to conceal the weapon, and came outside to kill."

The inference that Espinosa donned a sweatshirt in order to hide the icepick is highly speculative. Cortez did not testify that Espinosa had the icepick hidden inside the sweatshirt; to the contrary, he testified that Espinosa was carrying the icepick in his hand when he approached Lopez, although from Cortez's vantage point on the couch, it was obscured by Espinosa's sweatshirt. Given that Espinosa did not hide the icepick in the sweatshirt, the inference that he put the sweatshirt on as part of a plan to conceal it in order to ambush Lopez is untenable. (See *Boatman, supra*, 221 Cal.App.4th at pp. 1265-1266 [speculation, conjecture, and surmise does not rise " 'to the dignity of an inference' "].)

Evidence a defendant comes armed to a confrontation or retrieves a weapon during an argument can support an inference of planning. (See, e.g., *People v. Perez* (1992) 2 Cal.4th 1117, 1126*; People v. Thomas* (1992) 2 Cal.4th 489, 517; *People v. Elliot, supra,* 37 Cal.4th at p. 471; *People v. Wharton, supra*, 53 Cal.3d at p. 547; *People v. Lee* (2011) 51 Cal.4th 620, 636; *People v. Wright, supra,* 39 Cal.3d at p. 593, fn. 5.) A plan may be "rapidly and coldly formed" (*People v. Mendoza, supra*, 52 Cal.4th at p. 1070), and "planning activity occurring over a short period of time is sufficient to find premeditation." (*People v. Sanchez* (1995) 12 Cal.4th 1, 34, disapproved on another ground by *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22; *People v. Brady* (2010) 50 Cal.4th 547, 563.)

Here, however, the evidence Espinosa retrieved the weapon from elsewhere in the apartment in the minutes before the stabbing is minimal and speculative. Espinosa testified that his mother kept the icepick in a variety of locations in the house, and that he had seen it next to her bed earlier that day. However, he also testified he did not obtain it from the bedroom, but picked it up in the kitchen, at the same time he grabbed the knife. Espinosa's denial cannot be transmogrified into evidence the icepick was in the bedroom when he grabbed it. Cortez testified that five minutes after Lopez came out of the bedroom and continued to cut lemons, Espinosa came out of the bedroom. As Lopez moved toward Cortez to give him a lemon slice, Espinosa approached, carrying the icepick in his hand. Cortez's testimony on the point was too vague to clearly establish that Espinosa was armed with the icepick when he emerged from the bedroom area of the apartment.

But even inferring from Cortez's testimony that Espinosa was holding the icepick when he emerged from the back of the apartment, and therefore must have obtained it from the bedroom, the evidence of premeditation and deliberation is minimal. Assuming Espinosa grabbed the icepick from the bedroom, he did not have to make a calculated and considered decision to leave the apartment, or even the bedroom where he had spoken to Lopez, to obtain it, but simply picked it up from where it lay nearby, weakening the inference of planning.

Moreover, in most cases in which a defendant's retrieval of a weapon supported an inference of planning, considerable additional evidence of premeditation and deliberation was also present. (See, e.g., *People v. Perez, supra,* 2 Cal.4th at p. 1126 [defendant surreptitiously entered victim's house, obtained a knife from the kitchen, obtained a second knife when the first one broke during the stabbing, and was motivated to kill the victim to prevent her from identifying him]*; People v. Thomas, supra,* 2 Cal.4th at pp. 517-518 [defendant committed killings in the early morning hours, in an area away from victims' campsite, returned to his car to get a rifle and ammunition before the murders, loaded and reloaded the gun, and killed the two victims by single contact shots to the head and neck]; *People v. Elliot, supra,* 37 Cal.4th at p. 471 [defendant armed

himself with a knife, surveyed the bar, waited until it closed and patrons left, and killed the bartender in a back storeroom to eliminate her as a witness to attempted robbery and torture]; *People v. Wharton, supra,* 53 Cal.3d at pp. 547-548 [defendant stole and sold the victim's property after, and possibly before, murdering her]; *People v. Lee, supra,* 51 Cal.4th at pp. 636-637 [manner of killing was calm and exacting, and motivated by victim's refusal to engage in sexual relations with defendant]; *People v. Koontz, supra,* 27 Cal.4th at pp. 1080-1082 [defendant armed himself with concealed, loaded guns, argued with the victim, followed the victim into an office and locked the door, demanded the victim's car keys, shot the victim at close range, and prevented a witness from calling an ambulance]; *People v. Steele* (2002) 27 Cal.4th 1230, 1250 [defendant carried a knife into victim's home, after he had already stabbed another woman to death; "When a person stabs a woman to death, then leads another woman into her apartment with a knife in the pocket, the jury can readily infer that the person possessed the knife for the same purpose"]; *People v. Romero, supra,* 44 Cal.4th at p. 401 [defendant brought gun to video store and killed victim execution-style, with a single shot to the back of the head, because victim appeared to be a member of a rival gang]; *People v. Wright, supra,* 39 Cal.3d at pp. 592-593 [defendant confronted victim, returned to his trailer, obtained a loaded gun, and then actively looked for victim before shooting him]; *People v. Gonzalez, supra,* 54 Cal.4th at pp. 657, 664 [defendant recruited her brother and boyfriend to assault victim, drove to ambush site with a loaded gun and her license plate obscured; when the target fended off the knife attack, defendant cocked the rifle and handed it to her accomplice]; *People v. Nazeri, supra,* 187 Cal.App.4th at p. 1117 [defendant believed his wife was unfaithful and both she and her mother were plotting to kill him].) While our Supreme Court has stressed that the *Anderson* factors are descriptive, not normative, it has also continued to recognize that " ' "When evidence of all three categories is not present, 'we require either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.' [Citation.]" ' " (*People v. Prince, supra,* 40 Cal.4th at p. 1253; *People v. Elliot, supra,* 37 Cal.4th at p. 470; see also *Boatman, supra,* 221 Cal.App.4th at p. 1268 ["Even when manner of killing [evidence] is

strong, cases in which findings of premeditation and deliberation are upheld typically involve planning and motive evidence as well"].)

Nor does the fact that five minutes elapsed between Lopez's and Espinosa's emergence from the bedroom suffice to establish premeditation. The People are correct that five minutes is a sufficient period of time to allow for deliberation and premeditation. (See, e.g., *People v. Brady, supra,* 50 Cal.4th at p. 563 [premeditation and deliberation can occur in a brief period of time]; *People v. Halvorsen, supra,* 42 Cal.4th at p. 419; *People v. San Nicolas, supra,* 34 Cal.4th at p. 658.) But the fact sufficient time existed for premeditation to occur does not provide evidence that it actually did.

As noted, the *Anderson* factors are not exclusive. But here, no evidence outside the *Anderson* framework suggests premeditation or deliberation. Espinosa committed the murder in an apartment full of people, including Lopez's friend Cortez, who was likely to identify him as the killer. He did not plan for an undetected killing, wait for an opportune moment to commit the crime, or lure Lopez away to a spot where he could act without being observed. There was no evidence Espinosa said anything prior to, or during, the stabbing indicating a plan to kill. It appears undisputed that Espinosa grabbed the second weapon, the knife, from the area in the kitchen where Lopez was cutting lemons, suggesting his retrieval of that weapon, at least, was a spur of the moment decision. Espinosa did not have a ready means of escape preplanned; after the killing he stole a bicycle and rode to his cousin's home; obtained a ride to the residence of a friend, who was out; and then went to his sister's residence. He turned himself in within several hours of the murder and cooperated with police, suggesting he had not preplanned a way to deflect culpability. In making these observations we do not reweigh the evidence, which is not our function. (*People v. Smith* (2005) 37 Cal.4th 733, 738-739.) The point is that we cannot rely on evidence outside or in addition to the *Anderson* framework to uphold the finding of premeditation and deliberation.

In sum, with no evidence of motive or manner of killing, only minimal and speculative evidence of planning, and no other evidence suggesting premeditation or deliberation, the evidence was insufficient to support the first degree murder verdict.

There is, however, overwhelming evidence Espinosa committed second degree murder. Second degree murder is an unlawful killing with malice aforethought. (§ 187, subd. (a); *People v. Elmore*, *supra*, 59 Cal.4th at p. 133.) A defendant acts with express malice if he or she intends to kill. (§ 188; *People v. Beltran*, *supra*, 56 Cal.4th at p. 941.) Here, there can be little doubt Espinosa intended to kill; he stabbed Lopez 17 times, inflicting five fatal wounds to Lopez's back, chest, and head. Accordingly, we modify the judgment to reduce the conviction to second degree murder (*People v. Steger* (1976) 16 Cal.3d 539, 553; *Boatman*, *supra*, 221 Cal.App.4th at p. 1274), with a commensurate reduction in sentence to 16 years to life. (§ 190, subd. (a) [punishment for second degree murder is 15 years to life]; § 12022, subd. (b)(1) [one-year enhancement for personal use of a dangerous or deadly weapon during commission of a felony].)[17]

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[17] Our reduction of the offense to second degree murder moots Espinosa's contention that his sentence of 26 years to life, for first degree murder, amounts to cruel or unusual punishment.

DISPOSITION

The judgment is modified to reflect a conviction for second degree murder, with a sentence of 16 years to life. As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

KITCHING, J.*

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* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.